

REDACTED
DISTRICT COURT
ARAPAHOE COUNTY, CO

District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	2014 APR -4 PM 2: 58
THE PEOPLE OF THE STATE OF COLORADO, Plaintiff	
v.	
JAMES HOLMES, Defendant	σ COURT USE ONLY σ
DOUGLAS K. WILSON, Colorado State Public Defender Daniel King (No. 26129) Tamara A. Brady (No. 20728) Chief Trial Deputy State Public Defenders 1300 Broadway, Suite 400 Denver, Colorado 80203 Phone (303) 764-1400 Fax (303) 764-1478 E-mail: state.pubdef@coloradodefenders.us	Case No. 12CR1522 Division 201
MOTION FOR LEAVE TO FILE MOTION FOR CHANGE OF VENUE [D-205]	

CERTIFICATE OF CONFERRAL

The prosecution objects to this motion.

Mr. Holmes, through counsel, respectfully requests that this Court grant him leave to file the Motion for Change of Venue [D-206], filed simultaneously with this pleading. In support of this motion, Mr. Holmes states the following:

1. On June 3, 2012, Mr. Holmes provided notice to this Court and to the prosecution that he would be moving for a change of venue prior to trial. *See* Notice of Intent to Move for Change of Venue [D-112].

2. In response, this Court indicated it would determine whether “‘good cause’ exists for its late filing” at the time the defense filed its motion for a change of venue. *See* Order Regarding Defendant’s Notice of Intent to Move for a Change of Venue [D-112], p. 1. The Court also stated in its order that it was “likely to hold a hearing on any such motion after it has been fully briefed.” *Id.* at 2.

3. Counsel is unaware of any Colorado case that addresses the timeliness requirements with regard to a motion for a change of venue.

4. Colorado Rule of Criminal Procedure 22 states, “A motion for a change of venue or for a change of judge under these Rules may be made at or before arraignment or, for good cause shown for a late filing, at any time before trial.”

5. As an initial matter, it is unclear whether Crim. P. 22 applies to a change of venue motion based upon prejudicial pretrial publicity, or whether that rule is meant to apply only to changes of venue based upon jurisdictional issues and requests for a substitution of judges. *See, e.g.,* C.R.S. § 16-6-103; Crim. P. 21(b); Colo. Const. art. II, § 16. It makes sense that venue motions based upon jurisdictional issues and motions for substitution of judges could likely be raised “at or before arraignment,” given that the information to support such requests is reasonably likely to be known to the parties at that time. As further explained below, such is not the case with regard to prejudicial pretrial publicity.

6. To the extent that Crim. P. 22 does apply here, as explained below, there is ample good cause for “a late filing” in this case.

7. The factors a court must evaluate in determining whether media coverage of a case has created presumptive prejudice such that a change of venue prior to the commencement of jury selection is warranted include the proximity of the media coverage to the date of the trial, the revealed sources of news stories, specificity of the accounts of certain facts, the volume and intensity of the media coverage, extent of comment by the news reports on the facts of the case, the manner of presentation of the media coverage, the size and type of the locale, and the publication of highly incriminating facts not admissible at trial. *People v. McCrary*, 549 P.2d 1320, 1325-26 (Colo. 1976).

8. The most central of the factors outlined in *McCrary* is the proximity of the prejudicial coverage to the time of the trial. 549 P.2d at 1326 (citing to the fact that a bulk of the media coverage occurred a year and a half prior to the trial as one basis for denying the defendant’s motion for a change of venue); *see also People v. Bartowsheski*, 661 P.2d 235, 240-41 (1983) (citing to the fact that most of the media coverage occurred at the time of the crime which was six months prior to trial as one basis for denying the defendant’s motion for a change of venue).

9. The arraignment in this case occurred on March 12, 2013. Notably, the defense requested to continue that arraignment because it was not prepared to enter a plea. The Court denied that request and entered a not guilty plea on behalf of Mr. Holmes over defense objection and set a trial date of August 5, 2013. However, at that time, the prosecution had not yet announced whether they would seek to kill Mr. Holmes. Moreover, the defense indicated there was a possibility that Mr. Holmes would enter a plea of not guilty by reason of insanity.

10. The prosecution then announced it was seeking the death penalty on April 1, 2013, the trial date of August 5 was vacated and a trial date of February 3, 2014 was set. Motions hearings were scheduled for several weeks in October and December 2013.

11. Mr. Holmes tendered his plea of not guilty by reason of insanity on May 13, 2013. Shortly thereafter, the defense filed a Notice of Intent to Move for Change of Venue [D-112] informing both the Court and the prosecution of its intent to move for a change of venue. In that pleading, Mr. Holmes explained:

In order to determine whether pretrial publicity creates a presumption that Mr. Holmes will be denied a fair trial, this Court

must be able to review the totality of the publicity on the case from the outset of the case to the time right up until trial.

While a motion for change of venue is technically a non-capital motion, the issues surrounding a change of venue are more appropriately litigated closer to trial. In fact, one of the determinative factors in a change of venue motion is the proximity of the news coverage to the time of trial. *People v. Harlan*, 8 P.3d 448, 469 (Colo. 2000).

Notice of Intent to File Motion for Change of Venue [D-112], paras. 12 & 13.

12. It would have been impossible to file a motion for a change of venue at the time of arraignment, given that no trial date had been set prior to arraignment, and the most critical of the *McCrary* factors is the proximity of the prejudicial media coverage to the time of the trial. Moreover, the prosecution's decision to seek the death penalty and Mr. Holmes's plea of not guilty by reason of insanity had not yet occurred and the impact of that event on the media coverage of this case could not have been analyzed. Additionally, any media coverage of highly incriminating facts not admissible at trial could not be analyzed or presented to this Court until after the October motions hearings and court rulings. Of particular importance has been the media coverage regarding this Court's suppression of testimony about Mr. Holmes having a smirk on his face when contacted by the police in the minutes after the shooting. *See Exhibit MM, James Holmes' "smirk" tossed, wallet evidence allowed at trial*, Denver Post, October 25, 2013.

13. The defense initially anticipated filing the full motion for a change of venue in early December given the October motions hearings, the anticipated timing of the Court's rulings on those motions, and the proximity to the trial date that had previously been set in February.

14. However, as this Court is aware, the prosecution then filed Motion P-68 requesting a further sanity examination of Mr. Holmes on November 15, 2013. By November 21, 2013, this Court had vacated both the capital motions hearings as well as the trial date in order for the parties and the Court to address the prosecution's new motion. On December 10, 2013, this Court then continued the December hearings on Motion P-68 until late January. The defense then focused significant energies on the voluminous research and preparation necessary to address the prosecution's request.

15. Moreover, at that point, the trial date had been vacated. The defense could not assess the propriety of the timing of filing a motion for change of venue until a new trial date was set.

16. On February 27, 2014, the Court set a new trial date of October 14, 2014.

17. Even at this time, it is likely that additional relevant media coverage will occur between now, any hearing on the defense motion for change of venue given the matters yet to be

litigated,¹ and trial. Moreover, there are rulings on numerous motions still outstanding. It is highly likely that there will be even more prejudicial media coverage of this case between now and October.

18. Thus, while the defense feels that Motion [D-206] is still somewhat premature, based on the current analysis and research, the defense believes that it now has a good faith basis to request a change of venue, and that such a change is necessary to protect Mr. Holmes' federal and state constitutional rights to due process, a fair trial and impartial jury, the presumption of innocence, to have the prosecution prove every element of its case beyond a reasonable doubt, to a fair and reliable sentencing proceeding, his right to be free from cruel and unusual punishment, and his right to fundamental fairness. U.S. Const. amends. V, VI, VIII, XIV; Colo. Const. art. II, secs. 16, 18, 20, 25.

19. The defense intends to supplement the factual and legal analysis contained in Motion [D-206] as new information comes to light and as further analysis regarding the media coverage occurs. Specifically, the defense intends to submit a supplemental affidavit analyzing the additional news coverage between November 2013 and any hearing on this motion, because the media expert retained by the defense is not able to provide a piecemeal analysis of media content.²

20. Finally, Crim. P. 21(3) allows Mr. Holmes to renew a motion for change of venue that has been denied should new grounds arise. Mr. Holmes thus reserves his right to address actual prejudice to the jury panel based on pretrial publicity at such time as it becomes manifest.³

¹ Another factor cited in support of denying the motion for a change of venue in *McCrary* was that there was very little media coverage of pretrial hearings. *McCrary* at 1326.

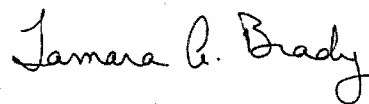
² Crim P. 21 states that written motions and affidavits shall be served upon the opposing party 7 days before the hearing on a Motion for Change of Venue. Crim. P. 21(a)(2)(II). The analysis attached to Motion [D-206] was completed at the time the defense initially intended to file this motion in December of 2013.

³ Another basis upon which to order a change of venue requires the accused to show a denial of a fair trial based upon actual prejudice or a nexus between extensive pretrial publicity and the specific jury panel called in the case. *See People v. Botham*, 629 P.2d 589, 596 (Colo. 1981). Clearly this argument would be premature at any time prior to actual jury selection, and Motion [D-206], filed simultaneously today, does not address actual prejudice. This request for leave to file Motion [D-206] pertains only to a change of venue claim that is based on presumed prejudice.

Mr. Holmes files this motion, and makes all other motions and objections in this case, whether or not specifically noted at the time of making the motion or objection, on the following grounds and authorities: the Due Process Clause, the Right to a Fair Trial by an Impartial Jury, the Rights to Counsel, Equal Protection, Confrontation, and Compulsory Process, the Rights to Remain Silent and to Appeal, and the Right to be Free from Cruel and Unusual Punishment, pursuant to the Federal and Colorado Constitutions generally, and specifically, the First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Fourteenth Amendments to the United States Constitutions, and Article II, sections 3, 6, 7, 10, 11, 16, 18, 20, 23, 25 and 28 of the Colorado Constitution.



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Dated: April 4, 2014

District Court, Arapahoe County, Colorado Arapahoe County Courthouse 7325 S. Potomac St., Centennial, CO 80112	<p style="text-align: center;">σ COURT USE ONLY σ</p>
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ORDER RE: MOTION FOR LEAVE TO FILE MOTION FOR CHANGE OF VENUE [D-205]	

Defendant's motion is hereby GRANTED _____ DENIED _____.

BY THE COURT:

 JUDGE

 Dated

I hereby certify that on April 4, 2014, I

mailed, via the United States Mail,

faxed, or

hand-delivered

a true and correct copy of the above and foregoing document to:

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